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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK HARRIS,

Defendant and Appellant.

F075070

(Super. Ct. No. SF018474A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Peña, Acting P.J., Meehan, J. and DeSantos, J.

INTRODUCTION

Appellant Patrick Harris appeals the judgment of conviction of assault with a deadly weapon by an inmate. He contends his conviction must be reversed because the instruction the court gave the jury, CALCRIM No. 2721, contained an invalid theory of guilt, and it is not discernable from the record beyond a reasonable doubt that the jury convicted him on a legally valid theory. Because we find any error harmless, we affirm.

PROCEDURAL BACKGROUND

Appellant was convicted by jury of one count of assault with a deadly weapon by an inmate (Pen. Code, § 4501).[1] At a bifurcated bench trial, the court found true appellant had 10 strike priors (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d)) and one prior serious felony conviction (§ 667, subd. (a). Appellant was sentenced to 25 years to life for count 1 plus a determinate five-year term for the prior serious felony (§ 667, subd. (a)) to be served consecutively to his sentence in another case.

FACTS

Appellant was a prisoner at Wasco State Prison. On August 19, 2014, Correctional Officer Antonio Salcedo opened appellant's cell door for "pill call." Appellant and his cellmate, inmate Dexter, did not immediately get into the pill line, but stayed in their cell when the door was opened. Salcedo opened the cell door of inmate Pardo and inmate Granado. Pardo walked out of his cell to the pill line. Granado stood at his cell door. Dexter rushed Pardo and started punching him. Pardo began punching Dexter. As Granado started walking toward the fight, appellant struck Granado with a state-issued, hard plastic, brown coffee cup tied to a rope made out of sheets with an overhand hammering motion. The cup shattered upon impact. Granado hunched down and began bleeding, and the two engaged in a fight. Salcedo eventually diffused the

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1 All further undesignated statutory references are to the Penal Code.

situation. Granado suffered a laceration to his head. Granado suggested he was treated with staples for the laceration.

Correctional Lieutenant Curtis Ford testified as an expert on inmate-manufactured weapons. Ford testified that inmates find ways to make weapons out of many kinds of items, such as toothbrushes, chess pieces, plastic, newspapers, magazines, and metal from the doors. Ford said he had seen papier-mache weapons made out of newspaper or magazines he believed could kill by being used as a spear. Ford said he is aware of an inmate dying as a result of being hit in the head with another inmate's fist.

Ford testified he has seen the state-issued plastic coffee cups being used to hit inmates and has seen them shatter on impact several times. The people he knows of who have been hit with the cup have sustained minor to serious injuries, with some requiring hospital stays and stitches. Some have been permanently disfigured, and none had died that he was aware of. Ford testified it was his opinion that the cup tied to the sheet in the present case was capable of and likely to cause death or great bodily injury.

DISCUSSION

Appellant contends the trial court erred by instructing the jury with CALCRIM No. 2721, the Judicial Council of California pattern instruction for assault with a deadly weapon by an inmate under section 4501 because it contains a legally invalid theory of guilt.

At the time of appellant's conviction, section 4501, subdivision (a), read in part, "every person confined in the state prison of this state who commits an assault upon the person of another with a deadly weapon or instrument shall be guilty of a felony and shall be imprisoned in the state prison for two, four, or six years to be served consecutively."

CALCRIM No. 2721 defines a deadly weapon as: "any object, instrument, or weapon that is inherently deadly *or dangerous* or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (Italics added.)

Appellant contends this definition permits a conviction based on three theories of guilt: (1) assault with an inherently deadly weapon; (2) assault with an inherently dangerous weapon; or (3) assault with a weapon used in such a way that it is capable of causing and likely to cause death or great bodily injury. He asserts only the first and third theories are legally correct, and the second is incorrect and is an invalid theory of guilt. He cites *People v. Brown* (2012) 210 Cal.App.4th 1 (*Brown*), where the Court of Appeal held the same in relation to an identical definition of "'deadly weapon'" in CALCRIM No. 875, the Judicial Council of California pattern jury instruction for assault with a deadly weapon. (*Brown*, *supra*, at p. 4.) Respondent concedes that CALCRIM No. 2721 is erroneous, but alleges the error is harmless. We decline to address the merits of appellant's argument because we agree with respondent that any error is harmless beyond a reasonable doubt.

The Supreme Court recently held that an error in instructions on the elements of a crime is harmless "so long as the error does not vitiate *all* of the jury's findings," meaning it would be harmless error if it were "clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 829, 831.) "[W]e apply the *Chapman* standard [citation] to evaluate an instruction that improperly defines an element of a charged offense." (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 319; see *Chapman v. California* (1967) 386 U.S. 18, 24; *Brown*, *supra*, 210 Cal.App.4th at pp. 12–13.) Under *Chapman*, an instructional error must result in reversal unless it appears beyond a reasonable doubt that the error did not contribute to the verdict. (*Stutelberg*, *supra*, at p. 319.)[2]

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[2] In a supplemental letter brief, appellant directs our attention to *People v. Aledamat* (2018) 20 Cal.App.5th 1149. The standard for harmlessness employed in *Aledamat* is a heightened standard that requires reversal when "there is no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a noninherently dangerous weapon was actually used)." (*Id.* at p. 1154.) We decline to apply this standard in favor of the one we set forth in the body of this opinion.

Here, any error was harmless because it is clear beyond a reasonable doubt that appellant was convicted based on how he used the cup tied to the sheet, not its inherent nature. (See *Brown, supra,* 210 Cal.App.4th at pp. 12–13.) The prosecutor's argument combined with the evidence adduced at trial make clear the prosecution's theory relied on how the weapon was used. Thus, there is no reasonable doubt the jury convicted appellant based on the weapon's "inherent" nature. The prosecutor started her argument by stating:

> "I'm sure last week when we gave opening statements Thursday morning and I said, 'A cup tied to a sheet,' you folks went back to voir dire the day before and thought, 'Why are we here?' [¶] But this isn't a water bottle plastic. This isn't a Tupper-Ware plastic. Look at this plastic. Feel this plastic. This is hard, non-malleable plastic. Very thick, not meant to break, not meant to be used by the ingenious inmates to make weapons …. But [appellant] figured out a way and he tied it to that bedsheet and *used it to bash Inmate Granado over the head*." (Italics added.)

The prosecutor then had the jurors pass the item around while she said, "Feel how heavy that is and *imagine that weapon being slammed against Inmate Granado's head* and ask yourself if that weapon is inherently deadly or dangerous." (Italics added.) She reminded the jury of Ford's testimony about injuries he had seen as a result of people being hit in the head and that he had seen an inmate die from one punch to the head. This all suggests she was relying on how the weapon was used. Though the prosecutor used the phrase "deadly or dangerous" loosely throughout her argument, it was clear, in the context of her entire argument and the trial, that her focus was on how the weapon was used.

The evidence at trial likewise creates no reasonable doubt that the jury convicted appellant based on how the weapon was used. Ford testified he had seen minor to serious injuries caused by use of the hard plastic cup as a weapon. This suggests the seriousness of the injury depends on how the weapon was used and suggests it is not an *inherently* deadly or dangerous weapon. Ford went on to testify about injuries that he has seen as

the result from being hit in the head, which directly relates to how the weapon was used in the present case. He concluded the weapon was capable of and likely to cause great bodily harm or death, which echoes the language in CALCRIM No. 2721 related to the weapon's use rather than its inherent nature.

There was also evidence adduced regarding Granado's injuries. The prosecution introduced Granado's statement to law enforcement that he received staples as a result of the attack. There was testimony from correctional officers who witnessed the attack that Granado began bleeding when he was struck with the cup. The prosecutor introduced a photograph that depicted blood splatter in the area of where appellant struck Granado with the cup. The prosecution also adduced testimony from Wasco State Prison psychiatric technician Clifford Tamas, who was the first responder to Granado's injuries. He testified to the injuries he observed on Granado's head and the rest of Granado's body. That a substantial part of the evidence was focused on Granado's injuries also supports that the prosecution was relying on the manner of use rather than its nature.[3]

For the foregoing reasons, we conclude any instructional error was harmless.

DISPOSITION

The judgment of conviction is affirmed.

[3] Appellant also contends, in case we were to find the instructional error issue was forfeited, that his trial counsel rendered ineffective assistance by not objecting. We do not reach appellant's contention because his primary claim fails on the merits.